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No. 848

# In the Supreme Court of the United States

OCTOBER TERM, 1943

J. J. BOWMAN AND JOHN S. BOWMAN, D/B/A BOWMAN REALTY COMPANY, PETITIONERS

*v.*

CHESTER BOWLES, PRICE ADMINISTRATOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS*

BRIEF FOR THE RESPONDENT IN OPPOSITION

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 74–81) is not yet reported. Its judgments dismissing the complaint and denying the Petition for Rehearing are set forth at pages 82 and 83 of the Record.

### JURISDICTION

The judgment of the United States Emergency Court of Appeals dismissing the Complaint was entered on February 24, 1944; and that denying the Petition for Rehearing was entered on March

8, 1944. The petition for a writ of certiorari was filed April 5, 1944. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended, 56 Stat. 23, 765 (sometimes referred to herein as "the Act").

## QUESTIONS PRESENTED

1. Whether any objection to the validity or the construction of the Rent Regulation for Housing was properly raised by the petitioners in the Emergency Court of Appeals.

2. Whether the Administrator's determination denying consent to petitioner's election, under Section 1 (e) of the Rent Regulation for Hotels and Rooming Houses, to bring their accommodations within the purview of that Regulation rather than the Regulation applicable to other types of accommodations, was arbitrary, capricious, or otherwise contrary to law.

## STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, and those of the two Rent Regulations involved (Rent Regulation for Housing, and Rent Regulation for Hotels and Rooming Houses) are set forth in the Appendix, *infra*, page 18, *et seq.*

## STATEMENT

On October 22, 1942, the Administrator issued two maximum rent regulations, Nos. 53 and 54A,

establishing maximum rents for substantially all housing accommodations in the Cincinnati Defense-Rental Area. Maximum Rent Regulation No. 54A for Hotels and Rooming Houses in that Area,[1] effective November 1, 1942, established as the maximum legal rents for rooms in hotels and rooming houses which were rented or regularly offered for rent during the 30 days ending on March 1, 1942—

> the highest rent for each term or number of occupants for which the room was rented during that thirty-day period, or, if the room was not rented or was not rented for a particular term or number of occupants during that period, the rent for each term or number of occupants for which it was regularly offered during such period.[2]

Maximum Rent Regulation No. 53 for Housing Accommodations Other than Hotels and Rooming Houses in the Cincinnati Area,[3] issued and effective at the same time as the Hotel Regulation, established generally as maximum rents for ac-

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[1] 7 F. R. 8602. Subsequently designated Rent Regulation for Hotels and Rooming Houses, 8 F. R. 7334, and referred to hereinafter as "Hotel Regulation."

[2] Hotel Regulation, Section 4 (a). The opening paragraph of this Section states: "This section establishes separate maximum rents for different terms of occupancy (daily, weekly, or monthly) and numbers of occupants of a particular room."

[3] 7 F. R. 8596. Subsequently designated Rent Regulation for Housing, 8 F. R. 7322, and referred to hereinafter as "Housing Regulation."

commodations other than hotels and rooming houses[4] the rents charged on March 1, 1942. Thus, Section 4 (a) of the Housing Regulation provides:

> Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be:
>
> (a) *Rented on maximum rent date.* For housing accommodations rented on the maximum rent date [March 1, 1942], the rent for such accommodations on that date.

Unlike Section 4 (a) of the Hotel Regulation, this Section contains no specific provision for charging varying rents, depending upon or fluctuating with the term of occupancy of particular rooms.

Petitioners are the managing operators of a 32-unit apartment building known as Rosedale

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[4] The Hotel Regulation, in Section 1 (a), provides that it shall apply to rooms in hotels and rooming houses. As a corollary, Section 1 (b) (3) of the Housing Regulation exempts from its provisions hotels, rooming houses, or other accommodations brought under control of the Hotel Regulation with the consent of the Administrator. Both Regulations define as a hotel "any establishment generally recognized as such in its community, containing more than 50 rooms and used predominantly for transient occupancy" (Housing Regulation, Section 13 (a) (11); Hotel Regulation, Section 13 (a) (13)); and a rooming house as "a building or portion of a building other than a hotel in which a furnished room or rooms not constituting an apartment are rented on a short-time basis of daily, weekly, or monthly occupancy to more than two paying tenants not members of the landlord's immediate family . . ." Housing Regulation, Section 13 (a) (12); Hotel Regulation, Section 13 (a) (14)).

Apartments, located in Cincinnati, Ohio (R. 3). On March 1, 1942, 31 units were rented under yearly lease and the remaining unit under semi-annual lease (R. 6, 13). Since their accommodations were not embraced within the definitions of hotels or rooming houses in the Hotel Regulation they became subject to the provisions of the Housing Regulation. Pursuant to Section 7 of this Regulation petitioners attempted to file registration statements for their apartments with the area rent-control office (R. 15–19). These statements failed to list single maximum rents for each apartment, as called for by Part C, item 7 of the registration form (R. 16–17), but listed for each apartment several maximum rents varying with the term of occupancy and number of occupants.[5] The registration statements were rejected by the local Area Rent Director on the ground that Section 4 (a) of the Housing Regulation did not permit varying maximum rents for housing units, depending on the term of occupancy (R. 7, 20). Petitioners were also notified that the maximum

[5] E. g., with respect to Apartment No. 1, which was rented under yearly lease on March 1, 1942, at $85.00 per month (R. 6), petitioners inserted the following in a blank space on the registration form: "Temporary rate, $45 per week. Temporary rate, $150 per month. Semipermanent rate, $100 per month. Permanent on contract rate, $85 per month. Plus $10 per month for each occupant in excess of 3" (R. 18). The maximum rents for all of the units are as listed in protestant's Exhibit 2, in the column headed "March 1, 1942" (R. 6). The weekly and monthly rates it desired to establish as maximum rents are listed in columns A and B.

rent for each of their units was the rent charged on March 1, 1942, irrespective of whether the tenant's term of occupancy was of longer or shorter duration than the maximum rent date tenant's term (R. 21–22).

At the time these registration statements were rejected, petitioners were advised that Section 1 (e) of the Hotel Regulation provided a method whereby the jurisdiction over accommodations for which varying maximum rents were desired to be established might be transferred from the Housing Regulation to the Hotel Regulation (R. 21). This Section provides that accommodations which do not come within the definitions of hotel or rooming house in the Regulations may be brought within the scope of the Hotel Regulation upon an election made by the owner with the consent of the Rent Director or Price Administrator.[6] Consent

[6] Section 1 (e) of the Hotel Regulation provides:

"(e) *Election by landlord to bring housing under this regulation.* Where a building or establishment which does not come within the definitions of a hotel or rooming house contains one or more furnished rooms or other furnished housing accommodations rented on a daily, weekly, or monthly basis, the landlord may, with the consent of the Administrator, elect to bring all housing accommodations within such building or establishment under the control of this regulation. A landlord who so elects shall file a registration statement under this regulation for all such housing accommodations, accompanied by a written request to the Administrator to consent to such election.

"If the Administrator finds that the provisions of this regulation establishing maximum rents are better adapted to

to the election must be given if it is determined that the provisions of the Hotel Regulation "are better adapted to the rental practices" for the building than the provisions of the Housing Regulation.[7] Petitioners, however, were given no assurance that their situation would meet that standard (R. 22).

Thereafter, on February 15, 1943, and March 10, 1943, petitioners filed their election or petition for individual relief with the Rent Director for the Cincinnati Defense-Rental Area, requesting his consent to their election to bring their accommodations under the control of the Hotel Regulation (R. 23, 24, 41). On March 19, 1943, the Rent Director entered an order denying consent to such election (R. 43–44). On April 21, 1943, petitioners filed with the Regional Administrator for Region III an application for review of the Area Rent Director's order accompanied by their objections to that order (R. 45). On June 15, 1943, the application for review was denied, with appropriate findings of fact and accompanying opinion (R. 50).

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the rental practices for such building or establishment than the provisions of the Rent Regulation for Housing, he shall consent to the landlord's election. Upon such consent, all housing accommodations within such building or establishment which are or hereafter may be rented or offered for rent shall become subject to the provisions of this regulation, and shall be considered rooms within a rooming house for the purposes of the provisions relating to eviction."

[7] *Ibid.*

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Subsequently, on July 31, 1943, petitioners filed their protest with the Price Administrator, requesting that "the orders heretofore made in this matter be reversed," and that the Area Rent Director be "ordered to consent to Protestants' registration of the subject property under Maximum Rent Regulations for Hotels and Rooming Houses" (R. 1, 4). The protest was denied by order issued September 1, 1943 (R. 11). In an accompanying opinion stating the grounds for denial the Administrator found that petitioners' rental practices were not better adapted to the Hotel Regulation than to the Housing Regulation for the reason that the actual rentings on March 1, 1942, and thereafter, were for permanent occupancy whereas the Hotel Regulation was intended to control rentals for accommodations rented on a nonpermanent or transient basis (R. 13–14).

Petitioners' complaint to the order denying their protest was filed in the Emergency Court of Appeals on September 29, 1943 (R. 53). The complaint was dismissed on February 24, 1944, the court holding that since the Administrator's finding that petitioners' rental practices were not better adapted to the Hotel Regulation than to the Housing Regulation was not unreasonable, his refusal of consent to their election was not arbitrary, capricious, or otherwise contrary to law (R. 74). On March 8, the court denied peti-

tioners' petition for rehearing which had been filed on March 6, 1944 (R. 83).[8]

ARGUMENT

The decision of the Emergency Court of Appeals presents no constitutional question and no issue of federal law of general significance.

1. The court correctly determined that neither the construction nor the validity of Section 4 (a) of the Housing Regulation was before it for de-

[8] Subsequently, on petitioner J. J. Bowman's plea of guilty, a judgment was entered on April 17, 1944 by the United States District Court for the Southern District of Ohio, in No. 6346, adjudging petitioner guilty on the following count, upon indictment duly presented:

"J. Julian Bowman, on or about February 15, 1943 . . . did make and deliver to the Cincinnati Area Rent Office of the Office of Price Administration . . . certain documents, knowingly, wilfully, and unlawfully making therein false representation, said documents being an application to bring within Regulation 54A . . . the Rosedale Apartments, 3547 Rosedale Place, Cincinnati, Ohio, and as required by the regulations, application with a registration (Form DH-D) covering hotels and rooming houses; said application and registration being as herein set forth. [The document is identical to that set forth in the Record at pp. 24–26].

"Said document is false in that said apartments had not been rented or regularly offered for rent on or prior to March 1, 1942, for the amounts set forth in said registration under the so-called heading of temporary and semipermanent rates nor had said apartments been rented or regularly offered for rent for different rates based upon different number of occupants as set forth in the registration, all contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

cision. Section 204 (a) of the Act prohibits the Emergency Court of Appeals from considering any objection to a Regulation or order unless such objection was first set forth in the protest underlying the complaint. The court refused to consider petitioners' request, upon oral argument of the cause, that Section 4 (a) of the Housing Regulation be construed to permit petitioners to utilize a sliding scale of maximum rents for their apartments, because the question had not been presented to the Administrator in the protest, as required by the Act (R. 76). For the same reason, the court declined to consider the question whether Section 4 (a), if construed to prohibit a plan of rentals varying with the term of occupancy, would be in accordance with law.

Petitioners, however, contend that they were entitled to a decision not only on the question whether the denial of consent to their election to come under the Hotel Regulation was reasonable, but also on the question whether Section 4 (a) of the Housing Regulation permits a "sliding scale of rents" (Pet. 12). They assert that "It is, and always has been, immaterial to Petitioners which Regulation they are subjected to, if the practice of variable and sliding scale of rents could be maintained" (Pet. 13). Without pointing to any specific allegation in their petition or protest in the administrative proceedings that the Housing Regulation be so construed, or that it would be

otherwise invalid, petitioners urge that the scope of the relief requested of the Administrator necessarily included such a request for an interpretation and an attack upon the Housing Regulation (Pet. 12–15), so that those issues were properly before the Emergency Court of Appeals.

Initially, there is no merit in petitioners' contentions that a question of construction of Section 4 (a) of the Housing Regulation was presented to the Administrator, or that it was the duty of the Emergency Court of Appeals to construe that Section. The document filed with the Administrator was a protest to an order under the Hotel Regulation. It did not comply with the procedural requirements for obtaining an official interpretation of a regulation [9] and was barren of any suggestion that an interpretation of another Regulation was sought (R. 1). In any event, since an official interpretation alone is not a "regulation, order, or price schedule," [10] the withholding or issuance of an interpretation is not subject to protest and cannot ground a complaint in the Emergency Court. Emergency Price Control Act of 1942, Section 204 (a).[11] See *Buckeye Parking Corporation* v. *Bowles,* No. 94 (decided

[9] The method for obtaining an interpretation is set forth in Revised Procedural Regulation No. 3, sub-part D, Sections 1300.241–1300.244, 8 F. R. 526, 1798, 3534, 5481.

[10] Emergency Price Control Act, Sections 203 (a) and 204 (a).

[11] Appendix, *infra*, p. 19.

March 28, 1944 by the Emergency Court of Appeals).[12]

Concededly, the question of the validity of the Housing and Hotel Regulations, construed to prohibit petitioners from employing a variable rental scale thereunder, might have been presented to the Emergency Court if the underlying protest had attacked either or both on that ground, and had been timely filed. *Buckeye Parking Corporation* v. *Bowles, supra.* The language of the protest, however, demonstrates that no objection to the legality of either Regulation was advanced before the Administrator. It was entitled "Protest Against Order of Regional Administrator" (R. 1) and states, in part (R. 1, 2):

> Protestants say also that on March 19, 1943, the Rent Director for said area issued an order concerning the subject property or housing accommodation, finding that the provisions of the Maximum Rent Regulations for Hotels and Rooming Houses were not adaptable to the subject property. This order was affirmed by order of the Regional [Administrator] for the Third Regional Office under date of June 15, 1943, and it is against that order, which is attached hereto and marked "Protestants Exhibit 1," that this protest is directed.

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[12] Since an interpretation is not a "regulation, order, or price schedule," petitioners are not foreclosed from raising the question of its reasonableness in enforcement or other proceedings. Emergency Price Control Act, Section 204 (d).

By way of relief, the protest requested the Administrator (R. 4):

> to consider the foregoing statements, the exhibits attached hereto, and the Maximum Rent Regulations for Hotels and Rooming Houses, it being protestants' request that the orders heretofore made in this matter be reversed, and the Area Rent Director ordered to consent to Protestants' registration of the subject property under Maximum Rent Regulations for Hotels and Rooming Houses.

Finally, from a procedural as well as substantive point of view the protest could not constitute an attack upon the validity of the Housing Regulation. The protest, filed more than 60 days after issuance of that Regulation, is barren of any statement as to the new grounds for protest.[13]

The Emergency Court, therefore, had no jurisdiction to consider and properly declined to rule upon any question of the validity of the Housing Regulation or of the Hotel Regulation. Emergency Price Control Act, Section 204 (a).[14] See *Patrick Cudahy Family Company* v. *Bowles,* 138 F. (2d) 574, certiorari denied, No. 518, present Term.

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[13] Section 203 (a) of the Act requires protests filed after the expiration of such 60 days to be based on new grounds (Appendix, *infra*, p. 18). Revised Procedural Regulation No. 3, (8 F. R. 526) requires that the protestant present a concise statement as to when the new grounds for protest arose (Section 1300.219 (f)).

[14] Appendix, *infra*, p. 19.

2. The single issue presented for decision by the Emergency Court of Appeals was, as stated by the court (R. 77):

> * * * whether the Administrator acted arbitrarily, capriciously, or otherwise not in accordance with law by his refusal to consent to complainants' election to register their rental accommodations under the Hotel Regulation.[16]

In applying the criterion of Section 1 (e) of the Hotel Regulation, the Administrator had before him the evidence in the Record. This evidence consists of petitioners' averments, among others, that they had "approximately ten years operation under a variable or sliding scale of rents as determined by the term of occupancy and the number of occupants," and "approximately ten years of operation during which period accommodations for transient guests have been at all times available" (R. 2). The Record also contains petitioners' statement that "We have been successful over a period of years in eliminating daily and weekly, and in the main, one and two months' renters" (R. 48), and petitioners' Exhibit 2 showing that on March 1, 1942, November 1, 1942, and July 29, 1943, all of the units in

[16] Section 204 (b) of the Act provides: "No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious."

petitioners' accommodations were actually rented for terms of six months or longer (R. 6).

On the basis of these data and the other evidence in the Record, the Administrator found that petitioners' actual practice immediately prior to the maximum rent date and well into 1943, as distinct from a paper practice during that period, was to rent their units for permanent occupancy (R. 13–14). He therefore determined that petitioners' actual rental practices were not better adapted to the Hotel Regulation than to the Housing Regulation.

This determination was affirmed by the Emergency Court of Appeals, as its opinion clearly shows, on the basis of the evidence before the Administrator and in the Record.

Petitioners urge, however, that the Emergency Court erroneously dismissed the complaint on purely "adjective" grounds or without due regard to the statutory standard for review (Pet. 15–19). They stress the following language from the court's opinion (R. 80):

> In no case may unsupported averments not admitted by the Administrator be held to be of sufficient weight to overcome the presumption of law that the Administrator's decision is proper.

and assert that, in fact, the record shows that the averments as to their rental practices are supported by evidence. Finally, they argue that those averments should have been taken as true

for the reason that they were either admitted by the Administrator or, at least, not denied.

However, examination of the record and the entire paragraph of the court's opinion from which the sentence referred to above was quoted shows patently that the decision below was rendered on the undisputed facts in the Record, and did not turn upon a presumption—as it might have (R. 80). This is illustrated by the next sentence of the court's opinion, which reads (R. 80):

> In this case, they [the general averments of petitioners] are of even less weight, inasmuch as the usual presumption is supported by undisputed facts in the record.[17]

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[17] To support their position that the allegations with respect to rental practices were supported by evidence, petitioners urge that such allegations were not denied by the Administrator in the administrative proceedings or in the Emergency Court of Appeals, but were in fact admitted by the local area rent attorney for the Office of Price Administration (Pet. 17–18). However, as pointed out in the opinion of the court, the statements in the Administrator's opinion accompanying the order denying the protest were "unquestionably inconsistent with an admission that any practice of renting to short term occupants on a sliding scale was currently being followed" (R. 80). The allegations of the complaint were directly put in issue by the Answer to the complaint (R. 66, Section 2). The so-called admissions in the letter of the local area rent attorney (R. 20–22) were, at most, no different than the general averments later made in the protest and in the complaint, and constituted only part

The opinion as a whole reveals meticulous study of the record and a finding that the evidence supported the Administrator's determination.

### CONCLUSION

The decision below is correct and presents no question of general importance. The petition should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
*Solicitor General.*

RICHARD H. FIELD,
*General Counsel,*
*Office of Price Administration.*

MAY 1944.

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of the evidence before the Administrator and the court. Moreover, a careful reading of the letter plainly indicates that the statements were not in fact admissions but merely constituted a summary of the facts previously set forth by the petitioners (R. 20, 21).